Filed 3/29/12; pub. & mod. order 4/26/12 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JAMULIANS AGAINST THE CASINO et al., Plaintiffs and Appellants, v. RANDELL IWASAKI, as Director, etc., Defendant and Respondent; JAMUL INDIAN TRIBE, Real Party in Interest and Respondent.	C067138 (Super. Ct. No. 34-2010-80000428-CU-WM-GDS)

Plaintiff association Jamulians Against the Casino (JAC) and various individual plaintiffs who are primarily JAC members (hereafter collectively referred to as JAC or plaintiff JAC) filed a petition for a writ of mandate. Plaintiff JAC contested defendant Randell Iwaskaki's execution of an April 2009 settlement agreement (hereafter Agreement)—in his capacity as

Director of Caltrans (Caltrans)—with real party in interest and respondent Jamul Indian Village (the Tribe).

The Agreement had resolved federal litigation between those parties over application of the California Environmental Quality Act (CEQA) (Pub. Res. Code, § 21000 et seq.) to the Tribe's efforts to upgrade its interchange on State Route 94 to allow for access to a proposed casino. JAC alleged the Agreement *itself* was subject to review procedures in CEQA before Caltrans could execute it. JAC premised this theory on an argument that Caltrans had committed itself in the Agreement to granting a permit for the interchange upgrade.

After JAC served the Tribe with the petition for writ of mandate, the Tribe made a special appearance to quash the summons (raising the doctrine of sovereign immunity) and seek dismissal of the action. The Tribe asserted it was an indispensible party without whom the action could not proceed. Caltrans demurred. It argued the Agreement did not constitute a "project" within the ambit of CEQA and did not commit it to granting a permit. The trial court sustained the demurrer on this basis and dismissed the action. It declined to rule on the Tribe's motions to quash and for dismissal in light of its ruling on the demurrer. JAC filed a timely notice of appeal.

On appeal, JAC initially reiterated its argument on the merits—that its allegations had adequately established the need for CEQA review before Caltrans could properly execute the Agreement. After our plenary review of the record, we invited

supplemental briefing on the issue of whether the trial court exceeded the proper scope of judicial notice in taking provisions of the Agreement into account that were not among the allegations of the petition (which neither incorporated the Agreement by reference nor attached it as an exhibit). JAC now agrees we must reverse on this basis. Caltrans does not present any cogent authority to the contrary.

Consistent with its litigation strategy in the trial court, the Tribe has declined to make a general appearance in this court as a respondent, but sought leave to appear as an amicus curiae (which we granted).[1] Although the Tribe's amicus brief makes colorable arguments in favor of its indispensible status,[2] this is an issue on which *the trial court* must exercise its discretion in balancing several criteria in the first instance. We therefore will reverse the judgment sustaining the demurrer with directions to the trial court to address the merits of the issue on remand.

FACTUAL AND PROCEDURAL BACKGROUND

Ordinarily we would need to determine whether the well-pled factual allegations of the petition state a cause of action, a question subject to our de novo review. (*Robison v. City of*

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[1] As the Tribe nonetheless is *named* as real party in interest in the pleading at issue, we must include it in the caption as a nominal real party in interest and respondent on appeal.

[2] This is an argument Caltrans raised, if only in passing, which allows us to consider the Tribe's arguments. (*Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 461.)

Manteca (2000) 78 Cal.App.4th 452, 455, 456.) In the present case, however, our focus is not the sufficiency of the pleading itself but the procedural propriety of the trial court's foray outside the "four corners" of the pleading through the vehicle of judicial notice. We therefore do not need to summarize the allegations of the petition beyond the general tenor we set out above. We begin with a few procedural details before we turn to the trial court's ruling.

JAC initially filed its petition in Alameda County Superior Court in August 2009. The petition incorporated three brief quotes from the April 2009 Agreement. The first occurred in the course of an allegation that the quoted provision represented a Caltrans commitment to issue a permit without CEQA review.[3] The other two were simply part of a description of the Tribe's duty under the Agreement to fund mitigation measures to further the express purpose of the Agreement, in the course of an allegation that Caltrans did not have "sufficient enforcement authority over these mitigation measures" because the Agreement included an express reservation of the Tribe's authority to assert sovereign immunity.[4]

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[3] "'[O]nce the . . . mitigation measures are approved, and the encroachment permit process completed, [Caltrans] *will issue the encroachment permit*. [(Agreement, § 3.B.3.)]'"

[4] "The Agreement tasks [the Tribe], rather than Caltrans, with performing all traffic studies . . . and funding all traffic improvements . . . , and providing funding for all mitigation measures and 'reasonable fair-share (cumulative impacts)

In October 2009, the parties (including the Tribe, under compulsion of the Alameda County court) apparently stipulated to a change of venue to Sacramento County. Caltrans had already filed a demurrer, in connection with which it "requested the Court to take judicial notice of the entire settlement agreement" (without citing any authority for taking judicial notice of the *truth* of its contents). Caltrans primarily argued that the casino proposal itself was nascent and thus not yet a "project" within CEQA's meaning, nor had Caltrans—in executing the Agreement—committed itself to approving the permit for the interchange upgrade. As is pertinent to this opinion, Caltrans also argued (in a couple of paragraphs at the end of its demurrer discussion) that if the Tribe asserted its sovereign immunity, there would not be anyone to represent the Tribe's interest in enforcing *its* interpretation of an agreement it had negotiated at arm's length with an adversary in resolution of the federal litigation.

The Tribe then filed its "hybrid" motion to quash service and to dismiss the complaint on the ground the Tribe was immune from suit and it would be improper to proceed in its absence to

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contributions toward[] improvements' of [State Route 94]. [(See Agreement, § 3.A.6.)]"

"By approving the Agreement with such a reservation, Caltrans left open the likelihood that the Agreement's ostensible goals of mitigating 'access and traffic impacts to the State Highway System' caused by [the Tribe's] casino project cannot be met. [(See Agreement, § 1.)]"

interpret its rights under the Agreement. The court set the matter concurrently with the still-pending demurrer.

In its opposition, JAC asserted that it would be improper to consider facts dehors the petition in connection with the "no project" argument. On the preapproval issue, JAC did cite to the Agreement (which appeared as an exhibit to the demurrer), though only to quote the language it already had alleged in the petition, as being a commitment to approval of the permit.[5] Matching Caltrans for brevity on the Tribe's status as an indispensible party, JAC asserted only that Caltrans was an adequate representative for the Tribe's interests as another party to the Agreement.

We come to the gist of the appeal. In its order sustaining the demurrer and dismissing the action, the trial court stated, "[the Agreement] *does not include or reference* plans for a casino project that are sufficiently defined or specific to allow meaningful rather than merely speculative review of potential impacts. *Nor does* [*the Agreement*] bind [Caltrans] to any particular casino design or action in support of a casino project, effectively preclude alternatives or mitigation measures appropriate for consideration under CEQA, or foreclose

[5] At the hearing in July 2010, JAC's counsel asserted, "This is the first hearing. This is not [a] proceeding based on a record or any evidence other than the pleadings presented to the Court which incorporate a document, the settlement agreement." On appeal, JAC's counsel asserts he meant only to acknowledge that the existence of the Agreement was the subject of judicial notice, not its contents beyond those included in the petition.

a 'no project' alternative . . . . [Citation.] [¶] . . . Section [3.A.] of [the Agreement] requires [the Tribe] to follow [Caltrans's] processes for the creation of [a] . . . project scoping document ('PSD') and environmental documentation ('ED'), 'which is subject to final approval and adoption by [Caltrans], in order to analyze all reasonably feasible alternatives for access to the Project' [(Agreement, § 3.A.4.), and] to conduct a traffic study [(Agreement, § 3.A.5.)] . . . . [¶] Section [3.B. of the Agreement] requires [Caltrans] to . . . process [the Tribe's] completed . . . permit application [diligently] . . . and to issue [a] . . . permit once mitigation measures are approved and the permit process is completed. *Contrary to the allegations of the petition and complaint,* section [3.B. of the Agreement] does not commit [Caltrans] to approving the project regardless of the adequacy of the project design, environmental impact analysis and identified mitigation measures. *Read in context and reasonably interpreted, the terms of section* [*3.B. of the Agreement*] require [Caltrans] to issue [a] . . . permit only after determining that [the Tribe] has complied with CEQA . . . . [Caltrans] retain[s] discretion under section [3.B.] to reject [the Tribe's] permit application upon a determination that [the Tribe] has not complied with CEQA requirements."[6] (Italics added.)

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[6] In explaining its reasoning at the hearing, the trial court had also noted that the "broader flavor" of the Agreement *as a whole* defeated the interpretation that JAC would accord the portion on which the petition relied in asserting Caltrans had

DISCUSSION

I. Exceeding the Proper Scope of Judicial Notice

A demurrer tests the pleading alone; a court cannot sustain a demurrer on the basis of extrinsic matter not appearing on the face of the pleading except for matters subject to judicial notice. (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864.) A court can properly take judicial notice of the *existence* of a document, but can take judicial notice only of the truth of the *contents* of documents such as findings of fact, conclusions of law, orders, and judgments. (*Id.* at p. 865.) It is immaterial that if the extrinsic matter is true it would defeat the cause of action, because a demurrer is not concerned with a party's ability to *prove* the allegations of the pleading. (*Id.* at p. 866 & fn. 5 [affidavit in other action that would render cause of action frivolous not proper subject of judicial notice]; accord, 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 947, pp. 360-361.)

In ruling on a demurrer, it is thus error to take judicial notice of the terms of an ordinary document submitted in support *or* interpret the terms; "a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence

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given preapproval; although noting JAC's argument was not frivolous "because the contract is written poorly in this context," the "dominant inference when *read as a whole* is that discretion is exercised" (italics added) in the permitting process.

and the opposing party is bound by what that evidence appears to show." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 115; accord, *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1103-1104; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605.)

As noted in the vintage case from this court to which we drew the attention of the parties, "The trial court erred in sustaining a demurrer to a complaint properly pleading a transfer of described water rights on the basis of evidence dehors the complaint, even though such evidence was the written instrument of transfer *mentioned in*, *but not made a part of*, *the complaint*." (*Johnson Rancho etc. Dist. v. County of Yuba* (1963) 223 Cal.App.2d 681, 684, italics added.) That the contract was in the administrative record in this case does not change this rule of judicial notice. (*Kleiner v. Garrison* (1947) 82 Cal.App.2d 442, 445-446; see 2A Cal.Jur.3d (2007) Administrative Law, § 796, p. 279; cf. *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 653 [administrative record for one cause of action noted as being outside scope of review of demurrer to other].)

Caltrans notes that JAC did not object to the request for judicial notice, and adverts to counsel's reference to the Agreement as being part of the record before the trial court. However, as we have noted, counsel characterizes his position regarding judicial notice as having assumed it would be limited to the existence of the document, not its contents. In any

event, Caltrans does not provide any authority to construe its demurrer as some species of stipulated summary judgment on appeal in the absence of extremely good cause, which requires that the record *clearly* indicate that the parties and trial court ignored the label placed on the motion and treated it as another. (*Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1608, 1609, 1610.)

Caltrans also asserts that the petition's mere reference to isolated provisions of the Agreement is tantamount to incorporation by reference. Caltrans does not identify (and we are not aware of) any such rule of pleading.

Finally, JAC cites the factual recitations of cases that note the trial courts took judicial notice of a document's contents in ruling on a demurrer. (*Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, 1156; *City of Santee v. County of San Diego* (2010) 186 Cal.App.4th 55, 60.) However, neither case expressly considered the *propriety* of the scope of facts judicially noticed. Their ratios decidendi as a result do not embrace that proposition. (*Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal.App.4th 421, 427, disapproved on a different ground in *Santisas v. Goodin* (1998) 17 Cal.4th 599, 614, fn. 8.)

As the trial court acknowledged at the hearing, JAC's reading of section 3.B.3. of the Agreement was not unreasonable

except in light of the Agreement as a whole.[7] But the Agreement *as a whole* was not properly before the trial court. Therefore, considering its other terms and interpreting the provision that JAC cited in its petition was error. We must therefore reverse the judgment.

II. The Tribe as an Indispensible Party

In its supplemental briefing, JAC concedes (as it must) that the Tribe is a necessary party within the meaning of Code of Civil Procedure section 389, subdivision (a), because the Tribe "obviously has an interest in defending [the Agreement]." It also concedes the Tribe is a sovereign nation not subject to suit, pointing out that its petition named the Tribe but did not allege any cause of action against it. It disputes, however, the Tribe's claim in its amicus brief that we should affirm the judgment because the Tribe is an indispensible party under subdivision (b) of that statute.[8] JAC does agree with our suggestion to the parties that if we think the Tribe has colorable arguments in favor of its indispensible status, we

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[7] We properly refer to the trial court's oral remarks because we are not using them to impeach its written order (e.g., *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 199), but are merely using them to illustrate its reasoning (*Yarrow v. State of California* (1960) 53 Cal.2d 427, 438).

[8] Caltrans does not offer any supplemental argument on this point beyond its one-paragraph assertion in its original brief to this effect, other than to argue that an indispensible party is not entitled to have the issue of its status resolved *before* a trial court rules on the merits of a demurrer.

should remand for the trial court to consider the issue in the first instance.

The designation of a party as indispensible results from a court's discretionary determination that it should dismiss the action in the absence of that party. (*Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1105, 1106 (*Deltakeeper*).) There are four relevant criteria to consider on this issue: (1) the extent to which a judgment would prejudice the absent party;[9] (2) the extent to which measures are available to mitigate any prejudice; (3) the ability of the court to address the issues in the absence of the party; and (4) the adequacy of the plaintiff's alternate remedies if the action is dismissed.[10] (*Deltakeeper*, at pp. 1107-1108; Code Civ. Proc., § 389, subd. (b).)

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[9] While we recognize no single factor is a sine qua non (*County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 35), we have described this factor as "critical" (*Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1298).

[10] On this latter criterion, a tribe's interest in maintaining its sovereign immunity can outweigh the lack of an adequate remedy for a plaintiff, though there is an exception for the enforcement of public rights to compliance with environmental protections if the property interests of the indispensible party are not affected. (*American Greyhound Racing, Inc. v. Hull* (9th Cir. 2002) 305 F.3d 1015, 1025-1026.) We note that federal cases have precedential value in this context, because the 1971 amendment to Code of Civil Procedure section 389 conformed the statute to federal practice. (Cal. Law Revision Com. com., 14 West's Ann. Code Civ. Proc. (2004 ed.) foll. § 389, pp. 418-419 [1971 Amends.]; see also 10 Cal. Law Revision Com. Rep. (1971) p. 517.)

Actions that involve duties under a contract ordinarily should not proceed in the absence of all the parties to a contract. (See *Deltakeeper*, *supra*, 94 Cal.App.4th at pp. 1105-1106.) The Tribe filed the federal litigation to dispute the extent to which it was obligated to comply with CEQA in seeking to upgrade its highway interchange, and reached a settlement that reflected its understanding of the acceptable limits. In the present state litigation, JAC champions its own interpretation of the Agreement as constituting preapproval of a project (and thus triggering duties on the part of Caltrans to conduct CEQA review before it can execute it). The ruling in favor of Caltrans may or may not be in accordance with the Tribe's interpretation of its rights.

However, we do not need to offer an advisory opinion on the merits of the question of indispensability, as we must reverse the judgment in any event. Moreover, an appellate court will not review an issue in the first instance that involves a trial court's discretionary application of the law to a set of facts. (*Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1131-1132.) JAC does not identify any basis for disqualifying the Tribe from the status of an indispensible party as a matter of law; it merely addresses the criteria that are within the *trial court's* discretionary power to balance. It may address these arguments to the trial court on remand.

DISPOSITION

The judgment dismissing the action is reversed and the matter is remanded with directions to the trial court to enter a new order overruling the demurrer of Caltrans, and to consider the hybrid motion of the Tribe to quash-dismiss on its merits. Plaintiff JAC shall recover its costs of appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BUTZ, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.

Filed 4/26/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JAMULIANS AGAINST THE CASINO et al., Plaintiffs and Appellants, v. RANDELL IWASAKI, as Director, etc., Defendant and Respondent; JAMUL INDIAN TRIBE, Real Party in Interest and Respondent.	C067138 (Super. Ct. No. 34-2010-80000428-CU-WM-GDS) ORDER MODIFYING OPINION AND CERTIFYING OPINION FOR PUBLICATION [NO CHANGE IN JUDGMENT]

APPEAL from a judgment of the Superior Court of Sacramento County, Lloyd G. Connelly, Judge. Reversed with directions.

Law Offices of Stephan C. Volker; Stephan C. Volker, Joshua A.H. Harris and Daniel P. Garrett-Steinman for Plaintiffs and Appellants.

Ronald W. Beals, Chief Counsel, Thomas C. Fellenz, Deputy Chief Counsel, David H. McCray, Assistant Chief Counsel, Brandon Sheldon Walker and Elizabeth R. Pollock for Defendant and Respondent.

No appearance for Real Party in Interest and Respondent.

THE COURT:

It is ordered that the opinion filed herein on March 29, 2012, be modified in the following particulars:

1. At page 10, in the second full paragraph, which begins "Finally, JAC cites", **delete** "JAC" and **replace** it with "Caltrans" so that it now reads "Finally, Caltrans cites".

2. At page 13, in the first full paragraph, which begins "Actions that involve duties", **delete** the second sentence, which reads:

> The Tribe filed the federal litigation to dispute the extent to which it was obligated to comply with CEQA in seeking to upgrade its highway interchange, and reached a settlement that reflected its understanding of the acceptable limits.

and **replace** it with the following (boldface indicates revisions):

> The Tribe filed the federal litigation to dispute the extent to which **Caltrans** was obligated to comply with CEQA in **reviewing the Tribe's application** to upgrade its highway interchange, and reached a settlement that reflected its understanding of the acceptable limits.

There is no change in judgment.

The opinion in the above-entitled matter filed on March 29, 2012, was not certified for publication. For good cause, it now appears that the opinion, as modified herein, should be

certified for publication in the Official Reports, and it is so ordered. **(*CERTIFIED FOR PUBLICATION.*)**

BY THE COURT:

BLEASE, Acting P. J.

ROBIE, J.

BUTZ, J.